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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RANDY GERHARD VIEHMEYER, Defendant and Appellant.	G045700 (Super. Ct. No. 09WF0804) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen and Gregg L. Prickett, Judges. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Andrew Mestman and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Randy Gerhard Viehmeyer of felony reckless driving while evading a police officer, misdemeanor driving under the influence of alcohol, and misdemeanor driving with a blood-alcohol concentration (BAC) of .08 percent or more. The trial court suspended imposition of sentence and granted probation for five years under various terms and conditions, including incarceration in the county jail for 270 days.

Viehmeyer asks this court to review the lower court's treatment of his pretrial motion to discover police officer personnel records (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)) and its denial of his request to reduce the felony reckless driving while evading a police officer conviction to a misdemeanor (Pen. Code, § 17, subdivision (b) (section 17(b)).[1] We conclude the trial court properly exercised its discretion in both instances and affirm the judgment.

FACTS

Prosecution Case

Around 1:00 a.m. on the morning of March 7, 2009, City of Garden Grove Police Officer Keith Higgins was on routine patrol in a marked police car when he noticed Viehmeyer make an unsafe left turn. He followed Viehmeyer's car into a residential area and watched him make another unsafe turn and drive through a red light. Higgins decided to make a traffic stop, but when he activated his overhead lights Viehmeyer did not yield. Instead, he accelerated from 40 miles per hour to

[1] Section 17(b) provides, in pertinent part, "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

approximately 70 miles per hour as he continued to drive through the residential area. Higgins activated his siren and Viehmeyer again increased his speed. Higgins radioed for additional officers to join the chase and then saw Viehmeyer make an unsafe lane change before he ran through another red light. Viehmeyer stopped after unsuccessfully negotiating a left turn and hitting a curb.

Higgins stopped his patrol car and got out with his gun in hand. He ordered Viehmeyer to put his hands up, but Viehmeyer did not comply. When two other Garden Grove police officers arrived on the scene, Higgins again ordered Viehmeyer to get out of his car with his hands up. Viehmeyer failed to comply again so the officers forcibly removed him from the car and knocked him to the ground. Viehmeyer struggled when the officers attempted to handcuff him, but Higgins applied his palm to a space between his shoulder blades and that resulted in Viehmeyer's compliance. Viehmeyer appeared to be under the influence of alcohol, and he was taken into custody. He was angry, belligerent, and uncooperative throughout the booking process and twice refused to take any type of BAC test. At around 2:19 a.m., a forensic phlebotomist forcibly obtained a blood sample. Subsequent laboratory analysis established Viehmeyer had a BAC of .228 percent at the time.

Defense Case

Viehmeyer testified on his own behalf. He denied running a red light at the intersection where he first came to Higgins' attention. He also claimed to have packed the inside of his car to the roof with boxes full of his property, and that he could only see out of the front and driver's side windows. He denied traveling at a high rate of speed, making an unsafe lane change, or driving through a second red light. Viehmeyer said he did not yield because he could not hear the siren. Viehmeyer denied being uncooperative, and said he was merely confused by Higgins' verbal directions. He also said the officers used excessive force during his arrest and injured his shoulder. Although Viehmeyer remembered being asked if he would submit to a test, he testified he

had asked for a breathalyzer test. According to Viehmeyer, the officers refused to administer the breathalyzer test. Viehmeyer admitted drinking beer before driving, but denied being under the influence or attempting to evade a police officer.

Viehmeyer also called a number of witnesses. His aunt testified he was driving her car on the night of the incident, and she remembered seeing a number of boxes in the car. An auto mechanic inspected Viehmeyer's car after the arrest and did not find the type of damage he would anticipate if the car had hit a curb. A doctor from the jail testified Viehmeyer had been sent to the hospital with shoulder pain, and an emergency room physician testified he treated Viehmeyer for a soft-tissue injury to his right shoulder.

DISCUSSION

Pitchess Motion

Viehmeyer filed two pretrial *Pitchess* motions to disclose the personnel files of the three officers involved in his arrest. There were two motions because Higgins had worked for the City of Irvine before transferring to the City of Garden Grove. In both motions, Viehmeyer sought evidence tending to show a lack of credibility on the officers' part, prior acts involving moral turpitude, and records of any illegal detentions or searches or seizures. He also requested the court review the officers' employment history, disciplinary records, if any, and any records pertaining to citizen complaints. Viehmeyer's attorney averred to have information the officers falsified their reports and used excessive force.

When challenged on appeal, the trial court's decision regarding the discoverability of material in police personnel files is reviewed under the abuse of discretion standard. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.) We find none here. Although the documents screened by the trial court were not made part of the record on appeal, the sealed reporter's transcripts of the two in camera proceedings indicate the court complied with all procedural requirements. The custodian of records was sworn

before the court and testified all records responsive to the defense motion were available for the court's review. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1230 (*Mooc*); *People v. White* (2011) 191 Cal.App.4th 1333, 1340.) The court, not the custodian of records, described each document for the record, conducted a thorough review of the individual documents, and then determined none of the documents presented were relevant to Viehmeyer's motion. (*Mooc, supra,* 26 Cal.4th at pp. 1229-1230.) In the absence of any indication to the contrary, we find no error or justification for remanding the matter for further proceedings. (See *People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-415.)

Motion to Reduce Felony to Misdemeanor

The jury found Viehmeyer guilty of two misdemeanors and one felony. After the jury returned its verdict, Viehmeyer requested the court exercise its discretion under section 17(b) to reduce the felony conviction to a misdemeanor. The court denied his request without prejudice to his raising the issue at a later time. Viehmeyer renewed his request in a sentencing brief filed with the court and at the sentencing hearing.

At that hearing, the court heard witnesses on Viehmeyer's behalf and heard the arguments of counsel. It read the probation report,[2] Viehmeyer's sentencing brief, and several letters submitted on Viehmeyer's behalf. According to the probation report, Viehmeyer's criminal record consists of a misdemeanor conviction for carrying a deadly weapon (baseball bat), misdemeanor battery and vandalism convictions arising from a bar fight, and a misdemeanor conviction for disturbing the peace, which also involved a fight.

Ultimately, the court declined to exercise its discretion and reduce the felony conviction to a misdemeanor, stating, "When the court weighs the seriousness of

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[2] The probation report alleged Viehmeyer associated with white supremacists, an allegation Viehmeyer denied at the sentencing hearing and mentions on appeal. The trial court carefully reviewed the allegations with Viehmeyer during the sentencing hearing, but we have found no evidence the allegations played any part in the trial court's decision.

the conduct in this case, the defendant's prior record which is documented in the probation report, those two factors the court believes are extensive enough and serious enough that the court declines an invitation to exercise its discretion pursuant to [section] 17 (b)." Viehmeyer claims the ruling amounts to an abuse of discretion. We disagree.

First, the burden is on Viehmeyer to clearly demonstrate error. Absent a showing the trial court acted irrationally or in an arbitrary fashion in making sentencing decisions, an appellate court presumes it acted to achieve legitimate sentencing objectives, and its discretionary determination may not be set aside. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 (*Alvarez*).) The trial court's "'decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citations.]" (*Id.* at p. 978.)

The pertinent factors to be considered by the trial court in exercising its discretion under section 17, subdivision (b)(3) include the "nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial." (*Alvarez, supra,* 14 Cal.4th at p. 981.) The court should also consider the objectives stated in the California Rules of Court, and any exercise of the trial court's authority must reflect due consideration for all relevant factors, including the defendant's criminal record and public safety. (*Id.* at pp. 981-982.)

Viehmeyer mentions California Rules of Court, rules 4.410, 4.421, and 4.423, but his argument focuses primarily on rule 4.410[3] and an assertion his criminal

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[3] California Rules of Court, rule 4.410(a) sets forth the general objectives of sentencing, including the following: "(1) Protecting society; [¶] (2) Punishing the defendant; [¶] (3) Encouraging the defendant to lead a law abiding life in the future and deterring him or her from future offenses; [¶] (4) Deterring others from criminal conduct by demonstrating its consequences." Rule 4.410(b) states "the sentencing judge must consider which objectives are of primary importance in the particular case . . . guided by

record is "insignificant." The characterization of his record is inapt. At the age of 22, Viehmeyer was convicted of misdemeanor possession of a deadly weapon. Two years later, a bar fight resulted in misdemeanor convictions for battery and vandalism. Then, when Viehmeyer was 41 years old, he got into another fight while intoxicated and suffered a misdemeanor disturbing the peace conviction. Although the probation report stated Viehmeyer had no convictions or failures to appear on his Department of Motor Vehicles record, it does list two suspensions of his driving privilege, one for refusing a chemical test and the other for not having insurance. Furthermore, Viehmeyer admitted having a prior conviction for driving under the influence at the sentencing hearing.

Viehmeyer now admits an addiction to alcohol, and he has apparently taken steps to address his addiction. His recent rehabilitative efforts are to be commended. Nevertheless, his efforts come *after* he placed numerous lives in jeopardy running through red lights and driving at speeds in excess of 70 miles per hour through a residential neighborhood. In short, he fails to demonstrate the trial court made an irrational decision by denying his motion. To the contrary, the record reveals the trial court carefully considered the appropriate factors and concluded the interests of justice would not be served by reducing Viehmeyer's felony conviction to a misdemeanor. Viehmeyer urges this court to disagree with the trial court's judgment, but that is not this court's role. Under the circumstances, the trial court's ruling was well within its sentencing discretion.

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statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case."

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

I CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J., Concurring:

I have signed the majority opinion under the compulsion of *People v. Myles* (2012) 53 Cal.4th 1181, *People v. Mooc* (2001) 26 Cal.4th 1216, 1229, and *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450. As presently expressed, California law seems to provide appellate review not of the *merits* of an in camera *Pitchess* hearing (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531), but only of the *procedures* followed. We have reviewed those procedures in this case and they are unobjectionable, so the majority opinion is correct.

But I don't think it's right. I cannot understand why this one area of criminal law provides for no meaningful review of the trial court's decision *on the merits*. It is beyond my ken that we provide appellate review of every other trial court decision, but choose not to provide it on this important issue of criminal discovery.

People v. Myles, supra, 53 Cal.4th at p. 1209, says, "The sealed transcript that is before us, in which the court 'state[d] for the record what documents it examined,' is adequate for purposes of conducting a meaningful appellate review." Under that interpretation of applicable precedent, the trial court does exactly what it did here: opens the file, recites its contents, tells us it finds nothing discoverable, and denies disclosure. We then receive a transcript that tells us "what documents [the court] examined." I am unable to understand how we can provide meaningful review under those circumstances.

There is simply no way to evaluate the trial court's decision on such a record. There could well be a complaint or a report we would consider discoverable. There could well be a dozen. We simply have no way of knowing. If we do not have copies of the documents in question, we cannot say whether the trial court has correctly assessed their import.

And I am unable to apperceive why providing copies of those documents presents a problem. It seems to me the trial court could easily order copies made of the

documents it has reviewed and seal them. We could then review those copies and determine whether the trial court correctly exercised its discretion.

I don't mean to suggest in any way that I distrust the trial court's review in this case – or in cases in general. I spend a great deal of my time marveling at the ability of our trial bench to make a correct call in five minutes on issues I struggle with for five days. But recognizing the competence and bona fides of our trial bench and giving them broad discretion is a far cry from instituting a system in which they are the last word on a question. And since I don't find such final authority in other areas of the law, I question its wisdom here.

But I am at a loss to interpret *Mooc* and *Myles* in any other way. *People v. Mooc*, the foundation of the *Myles* language to which I take exception, was a case in which the appellate court, frustrated by its inability to conduct a meaningful *Pitchess* review without the documents in question, ordered the entirety of the officer's personnel files provided. The Supreme Court correctly noted that order did not cure the problem because the trial court had not indicated what files it reviewed, so there was no way to know what documents in the complete file had been before it during its *Pitchess* hearing. But, since it now had the officer's entire personnel file before it, it reviewed the file and ruled on the motion itself, rather than delay the case any further.

In doing so, the court recognized the availability of a procedure whereby the trial court "can photocopy [the documents it reviewed] and place them in a confidential file," (*People v. Mooc, supra,* 26 Cal.4th at p. 1229) but went on to say, "Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined." (*Ibid*.) That is what the trial court did in this case, so I must sign the opinion.

Usually, when I come up against a result I find inexplicable, I go back over my work looking for the mistake that led me to that result. Usually I find it. But I can't find it here. There are cases I can distinguish. In *People v. Prince* (2007) 40 Cal.4th

1179, 1285-1286, for example, the court approved the procedure here, but did so in a case in which the record included "a full transcript of both segments of the in camera hearing and the documents that formed the basis for the court's conclusion that defendant was not entitled to the complaints that had been filed against [the officer]." (*Ibid*.) And I can find cases where the issue was considered only in passing, or in which the rule was stated without discussion. But I cannot find anything on which I could hang a dissent.

I can only do what I do here: Articulate my concern that our review of in camera *Pitchess* hearings does not go far enough, urge trial courts to include copies of the documents reviewed, as suggested in *Mooc*, and express my hope the Supreme Court will either correct our misunderstanding of the state of the law or reconsider its position.

BEDSWORTH, J.

I CONCUR:

RYLAARSDAM, J.